

IN THE SUPREME COURT OF BELIZE, A.D 2022
(CRIMINAL JURISDICTION)

Central Division

Indictment C73/2020

THE KING

v.

ANDRE GORDON

-

RAPE

BEFORE the Hon. Mr. Justice Ricardo Sandcroft

Appearances: Mr. Riis Cattouse along with Mr. Robert Lord, both Crown
Counsel for the Crown

Mr. Leeroy Banner for the Convict

Thursday, July 15th 2022, December 29, 2022 and January 27, 2023

Accused convicted- Guilty of Rape

SENTENCE JUDGEMENT

1. The accused was convicted as follows:

Count 1

Statement of Crime

Rape, contrary to section 46 of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2011.

Particulars of offence

Andre Gordon, on the 24th day of February 2017 at Belize City, in the Belize District, in the Central District of the Supreme Court, raped Kaminique Bush.

1. Andre Gordon (hereinafter “the Accused”) was indicted for the offence of rape, contrary to section 46 of the **Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020**, (“hereinafter the Code”) arising out of the allegation of rape made by Kaminique Bush that occurred on the 24th day of February 2017 at Belize City, in the Belize District, in the Central District of the Supreme Court. It was on the 29th day of June 2022 the trial, by Judge Alone, commenced.

The Prosecution’s Evidence

Evidence of Kaminique Bush

2. The complainant, Kaminique Bush, testified that on the 24th of February 2017, she was walking home with her two male companions from the Elements Nightclub on Newtown Barracks in Belize City, Belize. That Andre Gordon, the Accused stopped and offered her a ride on his motorcycle. She then asked him if her two male companions could be given a ride home as well. According to the witness, his response was: “Once I waan get home fast dem nuh mind”. Andre then dropped off her first male

companion, David, home. The witness testified that she and the other male companion, Kidel, then continued walking in the same direction (from Newtown Barracks to the Town Clock). She stated that awhile after Andre came back for Kidel on his motorcycle to take him home as well. They left her alone, so she carried on walking pass Bottom Dollar, enroute to her home, when a short while after, Andre stopped on his motorcycle to then give her a ride home. The witness indicated that she did accept his offer of a ride home but that on the way there, the Accused asked her if anyone was home or if she was expecting anyone to come and see her at that time. Kaminique replied that she did not know and was not sure. She stated that they reached her home address on 95 Amara Avenue and she got off his motorcycle. She then thanked him for the ride and proceeded upstairs to her apartment.

3. Kaminique Bush further testified that no one else was at home at this time. The witness also indicated that she did not lock the door as her room was hot. She saw someone in a white shirt coming upstairs, about 15 minutes after she sat down.
4. The complainant also testified that at around 3:15 a.m., after she had arrived home, she felt someone in front of her. The witness stated that she then opened her eyes and saw Andre Gordon standing in front of her in her room. She asked him, “Weh you di do up ya?” and the Accused replied, “Di check see yo reach ena yo spot safe”. She responded in the affirmative

that she had reached her apartment safely and asked him to leave her residence. She then remembered dosing off and falling asleep and then awhile after feeling pain and opening her eyes to Andre Gordon on top of her. The Complainant stated that Andre Gordon attempted to turn her around, but she fought and shoved him off and told him to stop what he was doing. The Accused did not stop his actions even as the Complainant started to cry and pleaded with him to stop. Kaminique asked him, “why you do me this for” and sometime during the incident he replied, “I soon cum”.

5. The complainant testified that Andre Gordon had his penis in her anus and that she felt pain. That he continued to insert his penis in her anus even after the complainant told him to stop while crying in pain. About fifteen (15) minutes later, the Accused got dressed quickly and ran out of her room. She then got up from the bed to lock her door thereafter and fell asleep.
6. Kaminique Bush further testified that she could visibly and clearly see the incident occurring at that time because of the light shining from the corridor directly outside and above her room door. The light from the room door was approximately fifteen (15) feet from her and Andre Gordon. That the light was shining through her door brightly.
7. Kaminique Bush also testified that she was positioned at the edge of the bed when Andre inserted his penis in her anus.

8. The complainant further testified that she had Andre in her view while he had his penis in her anus for about ten (10) to fifteen (15) minutes. And during that fifteen minutes the Accused was standing up and had her legs open. That in this position the Accused and herself were facing each other for the entire time.
9. The complainant testified that there was nothing blocking her view from Andre Gordon and that she was able to see from his waist up to his face.
10. The complainant also testified that Andre worked as her co-worker at Princess Ramada Casino and prior to the incident in question she knew Andre for about a year. And she would see Andre Gordon on a daily basis unless on a day off from work. She would see Andre Gordon on the floor working as a security guard at Princess Ramada Casino.
11. Kaminique Bush told the Court that on those workdays when she would see the Accused the lighting conditions were clear. That she would have him in her view on this occasion for about eight (8) hours on average for the whole shift. That she would walk pass him daily because she also worked on the same floor at Princess Ramada Casino. The complainant also testified that nothing would be blocking her view of him and that she would see his whole body on those occasions at work.
12. The complainant further testified that on the 23rd of February, prior to Andre Gordon dropping her home that morning on the 24th of February 2017, she had him in her sights for about 1 (one) hour that night.

13. The complainant stated that she knew Andre's last name to be Gordon. That if she were to see Andre Gordon again, she would be able to recognize him. (Witness points to Andre Gordon in stripped shirt in the dock.)
14. Kaminique Bush testified that on the 25th February 2017, she went to the hospital. On this day she woke up sometime after 12:00 p.m. and saw blood on her bed and took note that she had difficulty sitting down. This caused her to further inspect herself in the bathroom and she saw blood coming from her anus. Further, she testified that she went to the hospital and the doctor examined her. He gave her an injection and some medication and then she had to go back to the hospital thereafter to have surgery on her anus.
15. Kaminique Bush also testified that she went to the police station a week after the incident. That she went to the police station to make a report of the incident of rape. She waited a week to report the incident and give her statement to the police because she was ashamed.
16. The complainant testified that she did not have on any clothing when Andre Gordon had his penis in her anus and that the Accused was undressed as well. That she did not know how her clothes or Andre Gordon's clothes for that matter came off.
17. Kaminique Bush told the Court that prior to this alleged incident, Andre Gordon had passed a comment at their workplace. The comment made by

the Accused is this: ‘no matter weh ih take I wah get you and you won’t forget.’

Cross-Examination of Kaminique Bush

18. Counsel for the Defendant asked Ms. Bush about her decision to wait thirteen (13) days before making a police report of the incident. The witness accepted this as a fact and admits again to the court that she was ashamed to do so. The witness accepted the suggestion that she was ashamed because of her attraction to the female gender. The witness denied the suggestion that the reason for her shame was because she had sexual intercourse with a male.

19. The witness confirmed that on the 4th of March the Accused, Andre Cordon texted and asked her, “Okay, so where this rape talking coming from then”?

20. The witness also confirms for the Court that the Accused asked her if the alleged rape was what had occurred that night or if Tanya, the witness’s friend, was telling her to falsely accuse him. She affirms that she told him that the next-door neighbour had heard and seen the incident in question.

21. In cross examination the witness denied the suggestion that she had consensually engaged in sexual intercourse with the Accused. She denied the suggestion that she fabricated the offence of rape by the Accused because her neighbour had heard and witnessed the sexual act when she knew of her attraction to females. She further denied the suggestion that

she felt ashamed because her neighbour knew she had engaged in sexual intercourse.

22. She indicated to the Court that she waited until the 4th of March to contact the Accused because she was the only one at home and felt threatened by him. She denied the suggestion that her allegation of rape by the Accused is a fabrication.

Testimony of Jamilia Neal

23. Jamilia Neal testified that at around 3:45 a.m. on the 24th day of February 2017 she was asleep in her bedroom when a banging noise woke her up. The witness stated that the sound was coming from the other side of her bedroom wall and that she heard someone saying, “no, stop, left me lone”. The witness testified that to her knowledge Kaminique should have been at work at this time. So, Neal first assumed that it was her boyfriend, Rux with another woman.
24. Jamilia Neal also testified that Kaminique is her friend who lived next door. That her room’s wall partition consisted of one large plyboard, so she was able to hear the voices and noises coming from Kaminique’s apartment quite well. Jamilia Neal heard a bed board drop and two (2) to three (3) minutes later she heard Kaminique’s room door open. The witness had this to tell the court: “I gone see who come out of the room so I ran and opened my room door and that is when I saw Mr. Andre Gordon”. Jamilia Neal expounded that she saw Andre Gordon pulling Kaminique’s door open and

hurrying through the corridor. Immediately after, Jamilia Neal ran to her veranda railing where she witnessed the Accused get on a blue ninja motorcycle and take off up Amara Avenue.

25. Jamilia Neal further testified that the lighting was clear because three light bulbs stayed on in that hallway. And she had Andre Gordon in her view for about three minutes; she watched him pull in the door and hurry up through the corridor. That there was nothing obstructing her view and she was able to see his whole body.

26. Jamilia Neal testified that the average distance between Andre Gordon and herself was about seven (7) feet. The witness stated that she used to reside on Baracat Street and always had to pass the Accused' house on her way to the Oriental grocery store so this instance in question is not the first time that she had seen Gordon.

27. Jamilia Neal further testified under cross-examination that she heard a female voice coming from Kaminique's room.

28. This led the Counsel for the Defence to suggest to the witness that if she had heard Kaminique's voice then she reasonably would have told the police this. The witness then reiterates her original statement to the Defence Counsel that she heard someone saying, "no, stop, left me lone".

ACCUSED SWORN EVIDENCE

EXAMINATION-IN-CHIEF OF ANDRE GORDON BY MR. BANNER

29. The Accused, after being advised of his options, chose to give a sworn statement as examination in chief. Andre Gordon stated that he did not rape Kaminique Bush on the 24th of February 2017. He then proceeded to tell the Court that what took place was consensual intercourse with the Complainant. That on the 23rd of February he initially met Kaminique Bush at the Elements Night Club located on Barrack Road in Belize City, Belize and that she was with two other male companions. The Accused stated that he was dancing with Kaminique at the nightclub and sometime later that the two made plans to go to their place. Upon leaving, Gordon offered to take Kaminique's male companions to their respective homes on his motorcycle. He took her companions home before coming back for the Complainant who was at the HRCU Credit Union on Hydes Lane. Upon arrival, he parked his motorcycle at Kaminique's address so that she could get off his bike and go inside, but instead she invited him upstairs to her apartment. So, the Accused and the Complainant went inside the apartment, talked for a little bit and according to the Accused, both began taking off their clothing. The Accused testified that they had consensual sexual intercourse and afterwards both of them got dressed. He said that she accompanied him out of the apartment, through the hallway while still

hugging and kissing him and upon leaving the complainant said to him, “you mussie a tell everybody that you fuck me now”. He replied, “a noh wah say nothing” and then he left the premises.

30. Further, the Accused stated that after that day in question he saw and spoke to Kaminique Bush again almost every day at work. That after the incident he still spoke to Kaminique Bush when he would see her and that he even offered her a ride home on his motorcycle one Sunday night, to which she accepted.

CROSS-EXAMINATION OF ANDRE GORDON BY MR. CATTOUSE

31. The Accused in cross-examination stated that he only drank two cups of whiskey before meeting Kaminique Bush at the Elements Night Club. That he had these drinks at Pier 1 located on Newtown Barracks Road in Belize City, Belize District. He also testified that he saw the Complainant at Pier 1 as well, but he did not see her drink any alcoholic beverages. Under cross examination by the Crown Counsel the Accused then stated that he did not offer and agree to drop Kaminique’s friends’ home. (Witness had said before the he offered, and they agreed).

32. The Accused agreed with the Counsel’s question that Belize City is a dangerous city especially in the early hours of the morning. That it would not have been reasonable of the Accused to leave Ms. Bush, a young lady to walk the streets alone while dropping off her companions. He denied the

suggestion that Ms. Bush thanked him for the ride and took her leave upstairs to her apartment. He denied that Kaminique Bush was dosing off and falling asleep when he got to her room. He denied the suggestion that he realized she was drunk either the night prior at the nightclub or the early morning when the incident took place. He further denied that he could smell the aroma of alcohol coming from her breath after entering her room.

33. The Accused stated under cross examination that he knew Kaminique Bush about one (1) year prior to this incident in question. He also knew the prosecution's witness, Jamilia Neal before this incident. He admits that he used to flirt with the complainant at the workplace where both of them were employed prior to this incident.

34. The Accused denied the suggestion that he had knowledge of Kaminique's sexual attraction for women only. Further, he denied the suggestion that the complainant had informed him prior to this incident that she was not sexually attracted to him and preferred females.

35. The Accused denied the suggestion that he had inserted his penis into Kaminique's anus when having sex with her. He denied the suggestion that he had lied about inserting his penis into her vagina. He then denied that while having sexual intercourse that Kaminique told him to stop, "weh you di do" and proceeded to push him away from her.

36. He admitted that there was a chain of Facebook messages between him and Bush after the incident. That on March 4, 8:38 a.m. 2017, he sent a

message to Ms. Bush asking if she remembered what had occurred that morning. She responded to you, “yu tek advantage of me, I know exactly what happened”.

37. He denied the suggestion made by Counsel for the Crown that Ms. Bush was in and out of consciousness while engaging in sexual intercourse with him. He denied the suggestion that Kaminique Bush did not consent to having sexual intercourse with him.

38. He disagreed with the Counsel’s questioning that Ms. Bush in fact did not wait for him at the Princess Club and Casino, but that she was already walking on the street on her way home when he stopped to give her a ride.

39. Still in cross examination, the Accused denies exiting Kaminique’s room alone after engaging in sexual intercourse with her.

40. The Accused accepted the fact that he did not give his statement to the police as reasonably early as possible. The Accused further accepted the statement that he chose to withhold valuable information to keep for himself at the time of this incident and that this is the first time the court has heard his side of the story. He denied the suggestion that the reason he did not give his version of events in relation to the incident that occurred on 24th of February 2017 was because he needed time to concoct a story.

41. The case for the Accused was that the Complainant fabricated this assault and that his version of events on the morning in question is the truth.

RE-EXAMINATION OF ANDRE GORDON BY MR. BANNER

42. The accused in re-examination testified that he did in fact reply to the text message, “she knows that is not what happened”.

Sentence Principles Discussion

43. As regards the interests of society, the courts are inundated with mounting number of cases involving rape of vulnerable women by adult men. Society is pleading with the courts to impose stiffer sentences in order to deter would be offenders. Rape cases not only leave the victims permanently traumatized but also the family members of the victims as well as the family members of the perpetrators. I am sure that your child will be deeply disappointed with what you have done. You will be separated from him for a considerably long time. They will grow without a father figure around him.

44. The South Africa appeal court’s judgment in **S v SMM 2013 (2) SACR 292 (SCA)** is also instructive. I thus quote extensively from that judgment as follows:

[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In S v RO, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within a family

context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much quoted Zinn dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives...

[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way...

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in *S v Abrahams* that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In *Vilakazi Nugent JA* cautioned against the danger of heaping 'excessive punishment on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope of that it will arrest the scourge'. He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years imprisonment) and

the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result.

[19] Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, to the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind.

45. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound. I am of the view that a severe sentence is appropriate, taking into consideration all of the circumstances of the offence. But the youthfulness of the appellant as a first offender, the time he has spent in custody prior to being sentenced and the possibility of rehabilitation are of paramount importance in assessing the proportionality of the sentence to the offence.

46. Life imprisonment in my view would be disproportionately harsh in the circumstances.

47. However, it cannot be sufficiently underscored that rape is a reprehensible crime which shows no sign of abating in this country. Its seriousness and the total disregard displayed by perpetrators for the constitutionally

entrenched rights of their victims must be given their full weight in every sentencing procedure.

48. I associate myself with the sentiments that rape and the murder of women, wherever the crimes rear their ugly faces, should be visited with severe punishments. Our society is undoubtedly embarrassed by the killing and raping of women and children on a daily basis. The promulgation of legislation in the efforts of the combating of rape is a serious effort the legislature undertook in an attempt to arrest the scourge. The courts should join that fight, in some cases where possible, should show no mercy.

49. However, when considering an appropriate sentence one cannot lose sight of the fact that the convict was only 25 years of age at the time that he committed the offence, he is first offender, and a father of a toddler. Additionally by not showing remorse, he never admitted to raping the virtual complainant.

50. The potential for development or rehabilitation can be a mitigating factor. Rehabilitation of sex offenders is not only in the interest of the accused himself but also in the interest of society, considering the possibility that he might be released on parole eventually. Imprisonment should not only focus on punishment but should ideally give the accused an opportunity to reflect on his crime and its impact on the victim. However, an offender is not likely to rehabilitate himself – he will need the help of psychologists, social workers, and educator staff.

51. Rehabilitation should ideally instill a sense of responsibility on offenders for their criminal acts so they don't commit the crime again. It also encourages offenders to learn work skills and go through educational programmes to ensure their reintegration into society once released.
52. As for the argument that the appellant has no previous convictions, in cases involving the rape of a girl under the age of 16, there is no provision for treating first-time offenders differently.¹ In **S v. M**² the court, in line with other cases dealing with a departure of the minimum sentence,³ stated that a previously clean criminal record can be considered when determining whether there are "substantial and compelling circumstances" present, but warned that this is merely one of the considerations to take into account in conjunction with other facts.
53. When focussing on society's interest, it is noted that gender-based violence is Belize's second pandemic. World crime statistics of the second quarter of 2021/2022 showed a 14.1% increase in rape reporting, with a large number of the rape incidents taking place at the home of the victim or the rapist. Between July and September, over ten thousand rapes were reported. Rape is an underreported crime which means that the true extent of the crime is not known, One in ten cases opened result in a guilty verdict.

¹ S v M 2007 2 SACR 60 (W) par 65, S v Abrahams 2002 1 SACR 116 (SCA)

² S v M 2007 2 SACR 60 (W) par 69.

³ S v Abrahams 2002 (1) SACR 116 (SCA), S v Swartz 1999 (2) SACR 380 (C).

The fact that this rape was reported, leading to a successful conviction, is the exception rather than the norm.

54. A rape survivor's fundamental rights to dignity, privacy, security of person and freedom of abuse are infringed by rape. It is dehumanising, invasive and humiliating for the rape victim, with a psychological impact that will stay with the victim for life. It has a severe impact on the mental health of the victim. It commonly results in depression and post-traumatic stress disorder, which will impact the person's emotional well-being and her ability to form various relationships.

55. Yet, in **S v Skenjana**⁴ the court found that public interest is not necessarily best served by imposing very long sentences of imprisonment. The court stated that the deterrent effect of a prison sentence is not always proportionate to its length. Thinking that harsher sentences deter crime is a fallacy. What does deter crime is the capability of the state to identify, arrest, prosecute, convict, and punish the majority of serious offenders.⁵ This threat must be credible, and the state must communicate this credible threat of having the capacity to lock up criminals.

56. However, it seems like the bulk of the obligations are shifted to the court to *ensure* that these minimum sentences are meted out. In isolation from the whole criminal justice process, this does not make sense and seems to

⁴ 1985 (3) SA 51 (AD) at 54 I – 55 D.

⁵ Schönsteich M "Does Capital Punishment Deter?" 2002 (11) African Security Studies.

place a disproportionate burden on the accused to be "seen" to be punished, even if, in the bigger picture of punishment and the role it plays in society, it simply does not deter other criminals from doing the same.

57. Again, I want to reiterate: what the convict is accused of is a hideous crime, and he deserves to be punished and bear the consequences for that. But if the state only wants to deal with this scourge of rape inflicted in Belize by imposing minimum sentences, then the exercise is futile.

58. The other role that sentencing can play in reducing crime is through incapacitation and rehabilitation. Half of the men who rape does so on multiple occasions.⁶ Punitive measures aimed at interrupting the pattern of re-offending are therefore important. As far as incapacitation is concerned, if the capacity to arrest, prosecute and convict sexual offenders is low, it follows that the impact that convicting and imprisoning a sexual offender will have on the bigger picture is small.

59. As for rehabilitation, probably the biggest concern when imposing the minimum life sentence is the problem that it leads to overcrowded prisons, adding to the inhumane conditions in prisons coupled with very little scope for rehabilitation. Life imprisonment leaves an offender with very little to

⁶ Machisa M, Jina R, Labuschagne G, Vetten L, Loots L, Swemmer S, Meyersfeld B and Jewkes R "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012" 2017 Pretoria, South Africa: South African Medical Research Council, Gender and Health Research Unit 114.

hope for and thus less likely to be rehabilitated. This leads me to the issue of the sentencing regime.

60. The rape of vulnerable women is atrocious, and our country suffers from a scourge of rape. The law rightly punishes offenders severely for this crime. But it is time that we ask ourselves if these minimum sentences (that were meant to be temporary measures) are efficacious, whether it serves us as a society, or whether imposing minimum sentences merely creates the mirage that we are doing something about the crime.

61. As stated, judges can then exercise their discretion to depart from mandatory sentences if there are "substantial and compelling circumstances" but must then, out of necessity, focus on the possible factors that will justify a lower sentence rather than on what makes the crime a horrific act. That places a judge in an impossible position, where it seems as if judges make excuses for offenders when interrogating the factors that might justify a lower sentence rather than focusing and spending the bulk of their judgment discussing why the crime is so hideous that it deserves the punishment that the judge deems fitting.

62. I would have preferred to focus the bulk of my judgment on the offender's actions that require moral indignation and should be condemned by the court. Instead, I am asked to consider whether there are "substantial or compelling" circumstances that permit a lessor than a life sentence.

63. The dicta in **S v Dodd**⁷ is important in this context, where Ackerman J stated:

[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

64. In deciding the proper sentence, the court has to consider the traditional triad of factors normally considered by the courts at sentencing, namely: the personal circumstances of the accused, the nature and gravity of the crime(s) committed and the interests of the society.

65. At the same time the court must also have regard to the objectives of punishment, namely: prevention, deterrence, rehabilitation and retribution, to strike a balance among them. Having considered the objectives of

⁷ S v Dodo (CCT 1/01) [2001] ZACC 16.

punishment, the court will then have to decide which purpose or any combination of them is best served by the sentence to be imposed.

66. Seen in its totality, taking specific cognisance that humans are not a means to an end but an end in themselves while likewise condemning the convict's actions, I am of the view that the sentencing should also focus on rehabilitating the convict.

67. The accused testified in mitigation of sentence that he is now 37 years old. He was 30 years old when he committed the offence. He is a father of a son who was born on 23 January 2018. Before his arrest he was employed at the Department of Civil Aviation.

68. I have taken into account all the personal circumstances of the accused. I am of the view that there are no substantial and compelling circumstances warranting deviation from the minimum sentence prescribed by the Code.

69. Lastly, the impact on the victim should also be considered. The complainant was interviewed some years after the incident, and she was still experiencing trauma. She reported having flashbacks of the incident, questioning why she had to experience the traumatic event.

70. I am of the view that the personal circumstances of the accused are far outweighed by the seriousness of the crime committed, particularly the offence of rape. There are no words to express the horror that the deceased found herself in, when confronted with the accused.

71. Aggravating circumstances

1. There is a prevalence of this type of crime in society.
2. He raped the complainant in her home.
3. The complainant is a lesbian.
4. The violence that accompanied the rape
5. (Anal rape)

72. Mitigating Circumstances

He has a fairly good social enquiry report

He is a first-time offender

73. Having taken all the factors discussed above into account, I am satisfied that direct imprisonment is the only appropriate sentence in respect of the offence of rape of which the accused is convicted.

74. Sentencing guidelines:

This offence carries a mandatory minimum of 8 years with the usual starting point being 8 years and the usual range being 15 to 25 years. I will abide by the sentencing guidelines. The starting point is 8 years. I will increase the sentence by 8 years based on the aggravating circumstances outlined above which increases the sentence to 16 years.

He has a good social enquiry report so I will reduce his sentence by one year for the good social enquiry report i.e. 15 years. He will be given a

further reduction of a year as a first-time offender which reduces his sentence to 14 years. This reduces the sentence to 13 years and 6 months, for time spent on remand. He is to be eligible for parole after 8 years.

A substantial sentence of 14 years imprisonment seems to me to be sufficient to bring home the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.

Also, a substantial sentence of 14 years' imprisonment is a sentence that exacts proper retribution, provides adequate protection for society, and brings home to the convict the gravity of what he did but also leaves room for rehabilitation. He is to be eligible for parole after 8 years.

Dated the 27th day of January, 2023

RICARDO O. SANDCROFT
Justice of the Supreme Court